

-2-

During the July 19th interview, Examiner Huh suggested that applicants submit a written description of their position and that the interview be continued until the following week. The Examiner indicated that he would contact the undersigned to set a mutually convenient time and date. As requested, on July 19th, applicants sent a facsimile to Examiner Huh (copy attached as Exhibit A) with their position.

On August 2, 2007, the undersigned called Examiner Huh to determine the status of the proposed continuation of the July 19th interview. The Examiner informed the undersigned that the case was going to be transferred to another examiner (Examiner Catherine Witczak) and that Examiner Witczak would review applicants' July 19th facsimile, consult with Examiner Hayes regarding the prior prosecution of this application, and get back to the undersigned.

The undersigned told Examiner Huh that the four-month response date for the April 11th Office Action was August 13th and that to avoid further extension of time fees, applicants would appreciate hearing from Examiner Witczak prior to that date. Examiner Huh indicated that he expected that Examiner Witczak would contact the undersigned during the week of August 6, 2007.

On August 8, 2007, the undersigned called Examiner Witczak and learned from her voice mail that she would be out of her office until after the August 13th due date for the response to the April 11th Office Action. Applicants still wish to continue the interview begun with Examiner Huh in order to move this application forward as expeditiously as possible. However, to avoid unnecessary extension of time fees, this response is being filed in advance of such a continuation of the interview.

As indicated above, during the July 19th interview, Examiner Huh asked applicants to set forth their position in writing and applicants responded with their July 19th facsimile. Applicants believe that the facsimile addresses the issues raised in the April 11th Office Action and thus they incorporate that facsimile herein and request that it be treated as a response to the Office Action.

In item (3) of the facsimile, applicants requested further insight into the Examiner's objection to the language of Claim 12. The language in question reads:

display of heart rate data, applicants respectfully submit that it will make little sense for the Patent Office to adopt a policy where the display of useful data, such as the value of a calibration constant, does not satisfy the requirements of §101 and §112.

The foregoing comments in combination with the July 19th facsimile submitted herewith are believed to be fully responsive to the issues raised in the April 11th Office Action. The undersigned welcomes a continuation of the interview begun with Examiner Huh should that be considered helpful by Examiner Witczak. Alternatively,

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# FAX

**Date:** July 19, 2007  
**To:** Examiner Benjamin Huh  
Group Art Unit: 3767  
**Re:** U.S. Application No. 10/089,831 filed April 4, 2002  
National Phase of PCT/US00/27048  
**Ref:** BET-105 (Fresenius Ref: K02/01)

Dear Examiner Huh:

Thank you for taking the time to discuss the above case with me earlier today and for agreeing to conduct a more detailed telephone interview next week to explore the various issues raised in the April 11, 2007 Office Action.

As you requested, the following is a list of the topics I would hope that we could cover during next week's telephone interview:

(1) The §103 Rejection based on Peabody and Hagen

As I mentioned, the Peabody/Hagen §103 rejection was first made against independent Claim 12 and its dependent claims in the first Office Action for this application dated October 4, 2004. Applicants responded to this rejection in their Amendment filed on January 6, 2005, but the rejection was repeated in the second Office Action dated March 22, 2005 along with the suggestion from the Examiner that "Applicant should more clearly recite what he means by "continuously flowing" in the claim [Claim 12]."

In accordance with that suggestion, applicants submitted a definition of the word "continuous" from Webster's New World Dictionary and supporting argument in their Amendment filed on June 27, 2005. On September 23, 2005, the Peabody/Hagen §103 rejection of Claim 12 and its dependent claims was withdrawn. The Examiner's Reasons for Allowance stated that "a method and apparatus for controlling continuous dialysis fluid flow through a patient's peritoneal cavity using volume determined by bioimpedance measurements directed at the peritoneal cavity is not found nor fairly taught in the prior art of record, as argued by applicant and agreed by examiner." (emphasis added)

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Exhibit A

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## **FAX** Page 2

Based on this history, we had believed that the Peabody/Hagen §103 rejection had been resolved in 2005 and thus were surprised to find the same rejection again being made in the April 11, 2007 Office Action.

### **(2) The §101/§112 Issues**

As I mentioned, we believe that determining a number which has a biological significance, such as the volume of fluid in a subject's peritoneal cavity, satisfies §101 and §112.

As I indicated, the archetypical example of such a number is heart rate. Heart rate in and of itself is a useful, concrete, and tangible result. Although not as famous as heart rate, the volume of fluid in a subject's peritoneal cavity is in and of itself a useful, concrete, and tangible result. Certainly, the right to obtain patent protection on a method or apparatus for determining the value of a biological parameter cannot depend on whether the parameter is famous or not. Accordingly, unless the Patent Office plans to stop issuing patents on methods and apparatus for determining heart rate, which would hardly make sense, the claims of this application should be allowed.

### **(3) Claim Objection Re Claim 12**

The April 11, 2007 Office Action states that Step B of Claim 12 can be read in two ways and suggests that applicants change the word order of that step. We would appreciate some further insight into how Step B is being read and why the change in word order will help.

In terms of a time for next week's telephone interview, except for Monday afternoon, I am in my office all week. I look forward to our further conversation and appreciate your help with this case.

Regards,

Maurice M. Klee  
Registration No. 30,399

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